

**IOWA DEPARTMENT OF NATURAL RESOURCES
ADMINISTRATIVE ORDER**

IN THE MATTER OF:

**KEN LESS
Facility #62633
Johnson Township, Plymouth
County, Iowa**

**ADMINISTRATIVE ORDER
NO. 2011-AFO- 16**

TO: Ken Less
21601 Fir Avenue
Merrill, Iowa 51038-8640

I. SUMMARY

This Order requires you to comply with the provisions in Section V of this Order, subject to your appeal rights stated in this Order.

Questions regarding this Order should be directed to:

Relating to technical requirements:

Cindy Martens, Field Office 3
Department of Natural Resources
1900 N. Grand – Gateway North, Suite E17
Spencer, Iowa 51031-2200
Phone: 712/262-4177

Appeal, if any, addressed to:

Director, Department of Natural Resources
Henry A. Wallace Building
502 East Ninth Street
Des Moines, Iowa 50319-0034

Relating to appeal rights:

Kelli Book, Attorney
Department of Natural Resources
7900 Hickman Road, Suite 1
Windsor Heights, Iowa 50324
Phone: 515/281-8563

Penalty of payment to:

Department of Natural Resources
Henry A. Wallace Building
502 East Ninth Street
Des Moines, Iowa 50319-0034

II. JURISDICTION

This Order is issued pursuant to the provisions of Iowa Code section 455B.175(1), which authorizes the Director to issue any order necessary to secure compliance with or prevent a violation of Iowa Code Chapter 455B, Division III, Part 1 or Iowa Code Chapter 459 and the rules adopted or permits issued pursuant thereto; and Iowa Code section 455B.109 and 567 Iowa Administrative Code (IAC) Chapter 10, which authorize the Director to assess administrative penalties.

IOWA DEPARTMENT OF NATURAL RESOURCES
ADMINISTRATIVE ORDER
ISSUED TO: KEN LESS

III. STATEMENT OF FACTS

1. Ken Less owns and operates a 4,000 head (1,600 animal units) finish hog confinement facility. The facility is located at 21601 Fir Avenue, Merrill, Iowa (SE 1/4 Section 32 and SW 1/4 Section 33, Johnson Township, Plymouth County).
2. Mr. Less submitted the original manure management plan (MMP) for the facility on March 2, 2004 and the original Phosphorus Index on February 27, 2007. The due date for the annual update and fees was established as February 1 of each year and the next Phosphorus Index for the facility was due February 1, 2011.
3. Mr. Less failed to submit the complete 2011 MMP update with Phosphorus Index by February 1, 2011. On February 12, 2011, DNR Field Office 3 issued a Notice of Violation letter to Mr. Less for failing to submit a complete 2011 MMP update with Phosphorus Index by February 1, 2011. The letter indicated that if the required information was not submitted by March 1, 2011, further enforcement would include a monetary penalty.
4. On February 4, 2011, Carol Van Roekel of Cooperative Credit contacted DNR Field Office 3 to see if Mr. Less had submitted the MMP update. Ms. Van Roekel was informed the MMP update had not been submitted. Ms. Van Roekel stated she would have Mr. Less's loan officer call to remind him. On February 10 and 18, 2011, Ms. Van Roekel contacted the field office again to determine if Mr. Less had submitted the MMP update.
5. On February 25, 2011, Mr. Less submitted a short form MMP update with the compliance fee. The submittal did not include a Phosphorus Index. On February 28, 2011, DNR Field Office 3 sent Mr. Less a letter stating that the MMP submittal was incomplete and in order to avoid further enforcement the Phosphorus Index must be submitted within 10 days of the letter.
6. On March 2, 2011, Mr. Less contacted the field office regarding the February 28, 2011 letter. Mr. Less stated that he could not get the Phosphorus Index completed in 10 days. Mr. Less was informed that a penalty would still be assessed, but that he should continue to work on getting the Phosphorus Index submitted. On March 4, 2011, Ms. Van Roekel contacted the field office. She was informed that the short form MMP and fees had been submitted, but that the Phosphorus Index was missing. She stated she would have Mr. Less's loan officer call to remind him. On March 18, 2011, Ms. Van Roekel contacted the field office again to determine if Mr. Less had submitted the Phosphorus Index.
7. On March 23, 2011, DNR Field Office 3 issued a Notice of Referral letter to Mr. Less indicating that the matter was being referred for further enforcement. At the time of the Notice of Referral letter, Mr. Less had failed to submit the Phosphorus Index.

IOWA DEPARTMENT OF NATURAL RESOURCES
ADMINISTRATIVE ORDER
ISSUED TO: KEN LESS

8. On April 5, 2011, DNR Field Office 3 received the Phosphorus Index from Mr. Less.

9. Mr. Less has demonstrated a long history of failing to timely submit the MMP update and compliance fees for his facility. On February 9, 2007, Mr. Less was issued a Notice of Violation letter for failing to submit the 2007 MMP update and fees by February 1, 2007. Mr. Less submitted the MMP update and fees on March 10, 2007. On February 11, 2009, Mr. Less was issued a Notice of Violation letter for failing to submit the 2009 MMP update and fees by February 1, 2009. Mr. Less submitted the MMP update and fees on March 2, 2009. On February 11, 2010, Mr. Less was issued a Notice of Violation letter for failing to submit the 2010 MMP update and fees by February 1, 2010. Mr. Less submitted the MMP update and fees on March 3, 2010. Additionally, Mr. Less was issued a Notice of Violation letter on March 19, 2007 as a result of a MMP inspection that indicated Mr. Less was missing manure agreements for two application fields.

IV. CONCLUSIONS OF LAW

1. Iowa Code section 459.12(13) and 567 IAC 65.16(3)"b" require an owner of a confinement feeding operation who is required to submit a MMP to submit a complete updated MMP on an annual basis to the DNR. 567 IAC 65.17(17)"d" states that the Phosphorus Index is valid if the soil phosphorus concentration data is less than four years old. Mr. Less submitted an Iowa Phosphorus Index with the 2007 MMP update; therefore in order for the 2011 MMP update to be considered complete it should have included an Iowa Phosphorus Index. The 2011 MMP update was due February 1, 2011. A complete MMP update with an Iowa Phosphorus Index was not submitted until April 5, 2011. The above-mentioned facts indicate a violation of this provision.

V. ORDER

THEREFORE, the DNR orders Mr. Less to do the following:

1. Pay an administrative penalty of \$3,000.00 within 60 days of receipt of this Order, subject to appeal rights stated in Section VII.

VI. PENALTY

1. Iowa Code section 455B.191 authorizes the assessment of civil penalties of up to \$5,000.00 per day of violation for each of the water quality violations involved in this matter.

2. Iowa Code section 455B.109 authorizes the Environmental Protection Commission (Commission) to establish by rule a schedule of civil penalties up to \$10,000.00, which may be assessed administratively. The Commission has adopted

IOWA DEPARTMENT OF NATURAL RESOURCES
ADMINISTRATIVE ORDER
ISSUED TO: KEN LESS

this schedule with procedures and criteria for assessment of penalties in 567 IAC Chapter 10. Pursuant to this chapter, the DNR has determined that the most effective and efficient means of addressing the above-cited violations is the issuance of this Order with an administrative penalty of \$3,000.00. The administrative penalty is determined as follows:

Economic Benefit – Mr. Less's failure to timely submit a complete MMP update with an Iowa Phosphorus Index allowed him to save time and money. He has gained an economic benefit from the delay in the submittal. \$100.00 is assessed for this factor.

Gravity – One of the factors to be considered in determining the gravity of a violation is the amount of penalty authorized by the Iowa Code for that type of violation. As indicated above, substantial civil penalties are authorized by statute. Despite the high penalties authorized, the DNR has decided to handle the violations administratively at this time, as the most equitable and efficient means of resolving the matter. The MMP update and Iowa Phosphorus Index are crucial aspects of the DNR's animal feeding operation program. The MMP update and Iowa Phosphorus Index ensure that an animal feeding operation has adequate production land available so that the manure can be properly applied to cropland at an agronomic rate in order to prevent over application of manure. Mr. Less's facility has a capacity of 1600 animal units and environmental harm is likely to occur if the manure is not applied properly. DNR Field Office 3 has expended labor and expenses in informing Mr. Less of the requirements. Therefore, \$1,200.00 is assessed for this factor.

Culpability – Mr. Less has a duty to remain knowledgeable of DNR's requirements and to be alert to the probability that his conduct is subject to DNR's rules. DNR Field Office 3 sent Mr. Less notices of the need for the Iowa Phosphorus Index. Additionally, Mr. Less has submitted untimely MMP updates and fees in 2010, 2009, and 2007. Each year he was issued a Notice of Violation letter explaining the violations. Mr. Less has continuously violated the MMP update requirements and the repeated violations of the requirements demonstrate a blatant disregard for the requirements. Therefore, \$1,700.00 is assessed for this factor.

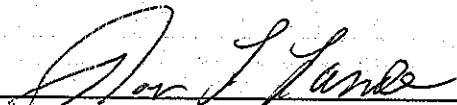
VII. APPEAL RIGHTS

Pursuant to Iowa Code section 455B.175, and 567 IAC chapter 7, a written Notice of Appeal to the Commission may be filed within 30 days of receipt of this Order. The Notice of Appeal should be filed with the Director of the DNR and must identify the specific portion or portions of this Order being appealed and include a short and plain statement of the reasons for appeal. A contested case hearing will then be commenced pursuant to Iowa Code chapter 17A and 561 IAC chapter 7.

IOWA DEPARTMENT OF NATURAL RESOURCES
ADMINISTRATIVE ORDER
ISSUED TO: KEN LESS

VIII. NONCOMPLIANCE

Compliance with Section V of this Order constitutes full satisfaction of all requirements pertaining to the violations described in this Order. Failure to comply with this Order may result in the imposition of administrative penalties pursuant to an administrative order or referral to the Attorney General to obtain injunctive relief and civil penalties pursuant to Iowa Code section 455B.191.



ROGER L. LANDE, DIRECTOR
Iowa Department of Natural Resources

Dated this 20th day of
June, 2011.

Facility #62633; Kelli Book, DNR Field Office 3, EPA, VIII.C.2